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in the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-788

ROBERT BROWN, a/k/a BOB BROWN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

Petitioner, ROBERT BROWN, a/k/a BOB BROWN, pursuant to Supreme Court Rule 58, files this his Petition for Rehearing of this Court's Order denying Certiorari in the above styled cause entered on July 25, 1974.

Petitioner respectfully contends this Court's decision denying his Petition for Writ of Certiorari is in error, and would show as follows:

1) Apparently the instant Petition for Writ of Certiorari was denied, at least in part, due to what was sub-

stantially a clerical error. Although this Court found that Petitioner had raised the issue of the obscenity vel non of the materials involved, it denied his Petition because "the materials themselves ha[d] not been filed with this Court." In fact, the two books which were the subject matter of this case (No. 73-788), had been previously certified and filed with this Court in Petitioner's original Petition for Writ of Certiorari, Brown v. United States, 413 U.S. 912 [United States Supreme Court Case No. 71-1368] (1973).[1] In the instant Petition, Petitioner made specific and repeated references to that fact, both in the "Appendix Index" at Page IV, and in the section designated "Opinion Below" at Page 2, believing in good faith that further certification was unnecessary since the Exhibits were already in the Courts' possession.

Clearly, as stated by Stern and Gressman, Supreme Court Practice:

> Where the original Petition was denied because of a jurisdictional defect which the Court expresaly noted or which was quite obvious, a Petition for Rehearing can be the vehicle for demonstrating that the defect has been cured or was non-existent, thereby resulting in the granting of Certiorari if all other factors are favorable. At 526.

[1]Upon receipt of the Order denying Certiorari herein, Counsel contacted the Clerk of this Court and requested that the Exhibits be transferred from this Court's file in U.S. Supreme Court Case No. 71-1368 to the instant Petition for Writ of Certiorari file, U.S. Supreme Court Case No. 73-788. The undersigned is informed and does believe that the Clerk of this Court has, in fact, done so.

For example, in **Cafeteria Employees' Union v. Angelos,** 319 U.S. 753, 754 (1943), a Petition for Writ of Certiorari was denied because it did not appear that the federal question presented had been properly presented to, or expressly passed on by, the New York Court of Appeals. However, upon a showing, in the Petition for Rehearing, that the question was properly presented, this Court granted the Petition for Writ of Certiorari and reversed. Similarly, in **Bakery and Pastry Drivers v. Wohl,** 315 U.S. 769, 773 (1941), this Court denied a Petition for Writ of Certiorari because it did not appear that the federal question presented by that Petition had necessarily been decided by the Court of Appeals. The Court of Appeals later certified that such question had been passed upon, a Petition for Rehearing was granted, the Writ of Certiorari granted, and the judgment summarily reversed. Further, in **Brady v. Terminal Railroad Association,** 302 U.S. 678, 688 (1937), the Petition for Writ of Certiorari was first denied because it did not appear from the record that there was a final judgment. The Petition for Rehearing established that there had, in fact, been a final judgment and Certiorari was subsequently granted.

2) The materials at bar, when considered as a whole and compared to materials previously determined by this Court not to be legally obscene, should enjoy constitutional protection from censorship. In both **Hamling v. United States,** ____U.S.____, 41 L.Ed.2d 590 (1974), and **Jenkins v. Georgia,** ____U.S.____, 41 L.Ed.2d 642 (1974), this Court expressly reemphasized its holding in **Miller v. California,** 413 U.S. 15, 25 (1973), that only the depiction, representation, or portrayal of patently offensive "hard core" sexual conduct was not entitled to First Amendment protection.

The materials involved herein are substantially no different than those presented to this Court by the Petitioner in **Trinkler v. Alabama**, ____U.S.____, 15 Cr.L. 4106 [United States Supreme Court Case No. 73-844] (1974), Petition for Writ of Certiorari granted, judgment vacated and remanded in light of **Hamling**, supra, and **Jenkins**, supra. The photographs accompanying the text of the instant materials portray (single and dual) inactive, posed, male nudes, which although sometimes paired and touching, do not exhibit any acts of intercourse, masturbation, bestiality, oral-genital intercourse, or sado-masochism. In fact, the photographs wholly fail to exhibit any specifically defined (and therefore prohibited under **Miller**, supra) simulated or actual sexual activity whatsoever.

Moreover, although the written text does describe explicit sexual activity, this Court has reversed findings of obscenity as to publications devoted entirely to explicit depictions or descriptions of the sexual activities of its characters, including detailed and vernacular descriptions reaching the ultimate in explicitness; see e.g. **Memoirs v. Massachusetts**, 383 U.S. 413 (1966) ("Fanny Hill"); **Aday v. United States**, 388 U.S. 477 (1967) ("Sex Life of a Cop"); **Corinth Publications v. Wesberry**, 388 U.S. 448 (1967) ("Sin Whisper"); **Mazes v. Ohio**, 399 U.S. 453 (1967) ("Orgy Club"); **Hoyt v. Minnesota**, 399 U.S. 524 (1970) ("The Way of a Man With a Maid", "Lady Susan's Cruise Lover", and three other books); and **Grove Press v. Gerstein**, 378 U.S. 577 (1964) ("Tropic of Cancer").

3) Petitioner has been denied his First and Fourteenth Amendment rights by this Court's failure to conduct its own "independent" constitutional review of the instant materials to determine the obscenity vel non of

the materials, under the second and third portions of the tri-parte **Miller**, supra, obscenity test, as mandated by this Court in **Jacobellis v. Ohio**, 378 U.S. 184 (1964), and **Jenkins v. Georgia**, supra. This Court stated in **Jacobellis v. Ohio**, supra, that:

> In other areas involving constitutional rights under the Due Process Clause, the Court has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case. (Citations omitted) And this has been particularly true where rights have been asserted under the First Amendment guarantees of free expression ... We cannot understand why the Court's duty should be any different in the present case where Jacobellis has been subjected to criminal conviction for disseminating a work of expression and is challenging that conviction as a deprivation of rights guaranteed by the First and Fourteenth Amendments. At 189, 190.

The Court went on to hold:

> Hence we reaffirm the principle that in "obscenity" cases as in all others involving rights derived from the First Amendment guarantees of free expression, **this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.** At 190 [Emphasis added].

Clearly, Petitioner is entitled to this constitutional protection instanter, especially in light of this Court's reaffirmation of the need for "independent" review expressed in **Miller v. California**, supra, and, of course, more recently in **Jenkins v. Georgia**, supra, wherein Mr. Justice Brennan states in his concurring opinion:

> After the Court's decision today, there can be no doubt that **Miller** requires appellate Courts — including this Court — to review independently the constitutional fact of obscenity. Moreover, the Court's task is not limited to reviewing a jury finding under part (c) of the **Miller** test that "the work, taken as a whole, lack[ed] serious literary, artistic, political or scientific value." **Miller** also requires independent review of a jury's determination under part (b) of the **Miller** test that "the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law." 41 L.Ed.2d 642 (1974). At 652.

Mr. Justice Brennan concluded by saying:

> In order to make the review mandated by **Miller**, the Court was required to screen the film **Carnal Knowledge** and make an independent determination of obscenity **vel non**. Id.

The need for this constitutional requirement is obvious to avoid the suppression of otherwise protected press materials.

It is respectfully submitted therefore, that this Court, which has not requested the certification of the materials involved, has failed to discharge its admitted responsibility under **Jenkins**, supra, to independently review these materials. At a minimum, Petitioner is entitled to this review here, unless, of course, this Court remands this matter to the original trier of fact for reevaluation of the materials in light of **Miller**, supra; **Jenkins**, supra; and **Hamling**, supra.

CONCLUSION

Based upon the above and foregoing, Petitioner respectfully requests this Honorable Court to grant the Petition for Rehearing herein, and then grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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MORRIS J. EZRA, ESQ.
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Rehearing was mailed to the SOLICITOR GENERAL of the United States, Washington, D. C., this____day of August, 1974.

JOEL HIRSCHHORN